

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD MICHAEL HOFFMAN,

Defendant-Appellant.

UNPUBLISHED
February 28, 2006

No. 255959
St. Joseph Circuit Court
LC No. 03-012027-FC

Before: Zahra, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant appeals as of right his conviction for first-degree premeditated murder. We affirm.

I. Basic Facts and Procedure

Defendant was convicted for the October, 2003, murder of Chris Shafer. Shafer was found at the Klinger Lake access site, lying on the ground, his head covered in blood, with blood running out of his mouth. His skull was open with brain matter protruding, and skull fragments were on the ground. The victim was air-lifted to a nearby hospital, but died from his injuries several days later. Defendant admitted hitting the victim with a jack handle, but claimed that he had acted in self-defense after the victim attacked him.

II. Analysis

Defendant contends on appeal that the trial court abused its discretion by denying defense counsel's motion to withdraw, that photos of the victim should have been inadmissible as evidence and that the evidence, as a whole, was insufficient to support his conviction. We disagree.

A. Motion To Withdraw

We review a trial court's ruling on a motion for withdrawal for an abuse of discretion. *People v Williams*, 386 Mich 565, 571, 578; 194 NW2d 337 (1972). An abuse of discretion occurs only where a court's action is so violative of fact and logic as to constitute a perversity of will or defiance of judgment. *People v Laws*, 218 Mich App 447, 456; 554 NW2d 586 (1996). When reviewing a trial court's decision to deny a defense attorney's motion to withdraw and a

defendant's motion for continuance to obtain another attorney, we consider the following factors: (1) whether the defendant is asserting a constitutional right; (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney; (3) whether the defendant was negligent in asserting his right; (4) whether the defendant is merely attempting to delay trial; and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. *People v Akins*, 259 Mich App 545, 557; 675 NW2d 863 (2003). In the instant case, although defendant is asserting his constitutional right to counsel, consideration of the other factors demonstrates no abuse of discretion by the trial court.

Defendant implicitly argues that a bona fide dispute existed here, yet the trial court concluded that defendant did not have the right to "manipulate the system" or play games by the simple expedient of disagreeing with his lawyer. During the proceedings, defendant filed *pro per* motions before the court challenging its jurisdiction, even though he was represented by counsel. These and other motions the court characterized as "nonsense" were brought by defendant in an apparent attempt to manipulate the process. Therefore, it was not so violative of fact and logic as to constitute a perversity of will or defiance of judgment for the trial court to find that no bona fide dispute existed.

Next, the record reflects that defendant was negligent in asserting his right and attempted to delay his trial. Defense counsel indicated during his motion that after a jail visit with defendant, which visit occurred between jury selection and the start of trial, counsel received a disk containing defendant's telephone conversations from jail. Defendant stated on the disk that he intended to fire his defense counsel but wanted to wait "until his 180 days were in," believing that he would gain some form of relief in that regard. Notwithstanding defendant's erroneous belief that he was entitled to some form of relief after being held 180 days, his stated desire to wait before firing his defense counsel evidences his negligence in asserting his right and his intent to delay trial. Finally, defendant has pointed to no resulting prejudice from the trial court's denial of defense counsel's motion to withdraw, nor do we discern any.

Defendant argues, however, that there had been no previous delays in his trial. Further, he contends that the trial court's inquiry into the "disagreement" between defendant and his counsel was superficial and completely inadequate. Neither of these arguments is a factor to be considered under the guidelines outlined by this Court in *Akins, supra*. Notwithstanding, we find defendant's arguments to be without merit.

After defense counsel's articulation of his reasons for the motion, the trial court gave defendant an opportunity to be heard on the matter. Defendant merely stated that he agreed with defense counsel. There is no indication that the trial court needed to inquire further and defendant has failed to point to any such indications. Furthermore, defendant has failed to cite any authority for his implicit contention that there is some higher inquiry required than to give each party an opportunity to be heard on the issue. Therefore, even though there were no previous delays in his trial, after considering the factors as outlined in *Akins, supra*, we find that the trial court did not abuse its discretion in denying the motion.

B. Admission Of Photos

The admission of photos may be objected to because (1) they are not material to any point in issue; (2) they do not adequately represent the person, place or thing photographed; or

(3) they are calculated to inflame the minds of the jurors. *People v Brannon*, 14 Mich App 690, 693; 165 NW2d 903 (1968). Additionally, the objection must specify the same ground for challenge as the party seeks to assert on appeal. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Defendant contends on appeal that two photos of the victim's head were erroneously admitted into evidence because they were gruesome, they lacked probative value, and their prejudicial impact outweighed their probative value; however, at trial defense counsel objected to the photos on the basis that the photos did not accurately represent the victim's condition at the crime scene because the victim may have received medical treatment. Although defense counsel referred to the photos as "rather inflammatory," when taken in context counsel's objection was to the accuracy of the photos' depiction rather than their gruesomeness. MRE 103(a)(1). Therefore the issue of accuracy was not preserved, and we review admission only for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The gruesomeness of a photo does not require that it be excluded as evidence. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995). Photos that could lead the jury to abdicate its truth-finding function and convict on passion alone should be excluded. *People v Anderson*, 209 Mich App 527, 536; 531 NW2d 780 (1995). Here, the photos at issue were material because they were related to whether defendant believed he was in imminent danger of harm when he continued to strike the victim and whether he intended to kill rather than incapacitate him. See *People v Heflin*, 434 Mich 482, 507-509; 456 NW2d 10 (1990) (finding that to satisfy the element of self-defense, the defendant must have an honest and reasonable belief of the danger of serious bodily harm or death and may only employ the amount of force necessary to defend himself). Further, the court was not incorrect in finding that the photos were probative because they showed the victim was struck repeatedly and suffered severe damage to his head. Finally, the photos were not more prejudicial than probative. Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence is given undue or preemptive weight by the jury. *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003). There must be an undue tendency to move the tribunal to make a decision on an improper basis or to abdicate its truth-finding function and convict on passion alone. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995); *Anderson, supra*, 209 Mich App 536. Here, four autopsy photos, also depicting the victim's extensive head injuries, as well as an interior photo of the victim taken after his scalp had been peeled back, were admitted without objection at trial. The two objected-to photos of the victim's injuries would not erroneously cause a jury to abdicate its truth-finding function and convict on passion alone where four other autopsy photos, also depicting the victim's extensive head injuries, were admitted without objection.

C. Sufficiency Of Evidence

Defendant's final contention on appeal is that there was insufficient evidence presented of premeditated and deliberated murder. We disagree. When reviewing a claim of insufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found all of the elements of the offense proven beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307, 319; 99 S Ct 2781; 61 L Ed 2d 560 (1979); *Wolfe, supra*, 440 Mich 508, 515; 489 NW2d 748 (1992). First-degree murder requires a willful, deliberate, and premeditated killing. MCL 750.316. In determining premeditation and deliberation, a trier of fact may consider: (1) a previous relationship between

defendant and victim; (2) defendant's actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and location of the wounds inflicted. *People v Moorer*, 262 Mich App 64, 77; 683 NW2d 736 (2004).

The previous relationship of the parties, defendant's actions before and after the killing, and the circumstances of the killing all support a finding of defendant's premeditation and deliberation and, consequently, first-degree murder. First, the parties were in a contentious, "love triangle" relationship and had had previous fights. Second, before the incident, defendant arranged to meet the victim at a remote site and told their girlfriend, Terri Nunnery, who arrived with the victim, to leave the two men alone. The jury could have properly inferred that defendant intended to stage an altercation in a remote location with no witnesses. Additionally, defendant brought alcohol with him and later admitted during a recorded phone call that it was his plan to get the victim drunk because he couldn't fight as well when he was drunk. Defendant also admitted having the jack handle "in case things got ugly" and kept the weapon accessible by keeping his trunk open. After the attack, defendant threw away Nunnery's cell phone and stopped her from assisting the victim. Defendant also sent Nunnery a copy of her police statement along with handwritten notations suggesting how she should testify. The circumstances of the killing itself also point to defendant's intent to kill the victim. Defendant repeatedly picked up the weapon after the victim took it from him and threw it, he struck the victim multiple times in the head as opposed to the body, and he continued to inflict blows after the victim had been rendered unconscious and helpless. There was sufficient evidence for the jury to find defendant had committed first-degree murder and his conviction should stand.

Finally, defendant argues that a "pyramiding" of inferences was impermissibly required here and cites *People v Atley*, 392 Mich 298, 315; 220 NW2d 465 (1974). The rule that inferences must be drawn from established facts and may not be built on an inference was overruled. See *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Affirmed.

/s/ Brian K. Zahra
/s/ William B. Murphy
/s/ Janet T. Neff